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Supreme Court, U.S.
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No. 03-____

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

PAUL MANTOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in exempting any "generally applicable" state-law rule from preemption under the Federal Arbitration Act, contrary to other federal and state courts that have held such rules preempted when selectively applied to invalidate arbitration agreements.

STATEMENT OF THE PARTIES AND AFFILIATES

Circuit City Stores, Inc. has no parent company and no publicly held company owns 10% or more of the corporation's stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE PARTIES AND AFFILIATES ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATEMENT UNDER RULE 29.4(C) 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. THIS COURT SHOULD GRANT THE PETITION TO ILLUSTRATE WHEN STATE-LAW RULES ARE PREEMPTED UNDER FAA § 2. 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 4

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 5

Dean Witter Reynolds v. Byrd,
470 U.S. 213 (1985) 4

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 5

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 5

Ingle v. Circuit City Stores, Inc.,
328 F.3d 1165 (9th Cir. 2003) 1, 3, 8

Mantor v. Circuit City Stores, Inc.,
335 F.3d 1101 (9th Cir. 2003) 1

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 4

Perry v. Thomas,
482 U.S. 483 (1987) 4, 5

Prima Paint Corp v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 4

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477 (1989) 4

STATUTES

9 U.S.C. § 2 ..... passim
28 U.S.C. § 451 2
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2403(b) 2
Cal. Civ. Code § 1670.5 2

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINION BELOW

The opinion of the Ninth Circuit (App. 1a-12a) is reported at *Mantor v. Circuit City Stores, Inc.*, 335 F.3d 1101 (9th Cir. 2003). The order of the district court compelling arbitration (App. 13a-14a) is unpublished.

[1] Circuit City also is simultaneously filing a petition for a writ of certiorari in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), which raises the same question presented. For the reasons explained below, this Court should grant both petitions or, in the alternative, grant the petition in *Ingle* and hold the petition in *Mantor*.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 22, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 29.4(C)

Because the proceeding draws into question the constitutionality of California's law of unconscionability, as codified in Cal. Civ. Code § 1670.5[2] and as applied in this case, and neither the State nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(b) may apply. No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(b), certified to the Attorney General of California the fact that the constitutionality of such California statute has been drawn into question.

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, provides in pertinent part:

> *§ 2* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any

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[2] Cal. Civ. Code § 1670.5 provides:

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

> part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

This case is one in a series of decisions by the Ninth Circuit invalidating arbitration agreements under California's law of unconscionability. Two months before this case was decided, the Ninth Circuit in *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (2003), invalidated an arbitration agreement substantially similar to the agreement at issue in the present case. Circuit City has concurrently filed petitions for a writ of certiorari in *Ingle* and in the present case, both of which present the same question.

This case, like *Ingle*, involves a Ninth Circuit decision invalidating an employment arbitration agreement under California's law of unconscionability. The question presented, however, is one of federal law, not state law. Federal law – specifically § 2 of the Federal Arbitration Act ("FAA" or "Act") – governs this case, and prohibits using state-law doctrines like the one applied below to invalidate arbitration agreements.

The decision below applies state unconscionability law in a way that is demonstrably hostile to arbitration, using it to fashion a new rule under which employment arbitration agreements are presumptively unenforceable. That decision is contrary to the terms and purpose of § 2, and in conflict with holdings of other courts. If allowed to stand, it will render meaningless many of this Court's decisions endorsing the use of arbitration in the employment context. This Court should grant review to resolve the conflict among the lower

courts, preserve the vitality of its own decisions, and enforce the FAA and its pro-arbitration policy.

A. Statutory Background

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, was enacted in 1925 to overcome longstanding judicial hostility toward arbitration agreements. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 220 n.6 (1985). The FAA establishes a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983). Because "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," this Court "rigorously enforce[s] agreements to arbitrate." *Byrd*, 470 U.S. at 221. This Court also rejects rules that "res[t] on a suspicion of arbitration," as such views have "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

Section 2 of the Act requires state and federal courts to enforce arbitration agreements as they would any other contract. *See* 9 U.S.C. § 2; *Perry v. Thomas*, 482 U.S. 483, 489 (1987) ("Section 2 . . . embodies a clear federal policy of requiring arbitration . . ."); *Prima Paint Corp v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (the FAA "make[s] arbitration agreements as enforceable as other contracts"). Section 2 also contains a narrow "saving clause." The clause provides that an arbitration agreement can be invalidated under state law only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If a state-law rule would invalidate an arbitration agreement, but that rule does not "exist at law or in equity for the revocation of any contract," the state-law rule is pre-

empted by § 2 of the FAA. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (FAA is "preemptive of state laws hostile to arbitration").

This Court has broadly construed § 2's preemptive sweep. State laws that on their face invalidate arbitration agreements are of course preempted. *See, e.g., Perry v. Thomas*, 482 U.S. at 491 (California statute allowing wage-collection actions to proceed "without regard to the existence of any private agreement to arbitrate"). So are state laws that on their face impose special conditions on the enforcement of arbitration agreements. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (Montana law requiring that notice of arbitration be typed in underlined capital letters). Of special relevance here, even state-law rules that do not on their face refer to arbitration are preempted if they are applied in an arbitration-specific manner. In *Perry*, for instance, the Court clarified that a general state-law principle – like unconscionability – is preempted by § 2 if its application "takes its meaning precisely from the fact that a contract to arbitrate is at issue." 482 U.S. at 492 n.9. "A court may not . . . rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable. . . ." *Id.*; *see also Doctor's Assocs.*, 517 U.S. at 697 n.3 (quoting *Perry*).

B. Factual Background

In the landmark decision of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court held that statutory claims for employment discrimination could be compelled into arbitration pursuant to mandatory pre-dispute arbitration agreements. In 1995, following *Gilmer* and its progeny, Circuit City implemented a mandatory pre-dispute arbitration program, the Associate Issue Resolution Program

("AIRP"), through which Circuit City and its Associates[3] agree to arbitrate any and all employment-related legal disputes arising between them.

Paul Mantor was employed by Circuit City as a Sales Associate when the AIRP first was presented in 1995. Like all Associates, Mantor was asked to sign an "Associate Receipt of Issue Resolution Package" form, and was given the opportunity to "opt out" of the AIRP by submitting an "Opt-Out Form" via U.S. Mail to Circuit City within 30 days of his receipt of the AIRP materials. Mantor did not sign or return the "Associate Receipt of Issue Resolution Package" form and never submitted an "Opt-Out Form" to Circuit City. Three years later, Circuit City discovered that Mantor never had submitted the "Associate Receipt of Issue Resolution Package" form documenting his receipt of the AIRP package. Mantor was presented with a new "Associate Receipt of Issue Resolution Package" form, which he signed, and was given a *second* 30-day period within which to opt-out of the AIRP. Even with this second opportunity to do so, Mantor did not "opt-out" of the AIRP. Nonetheless, the Ninth Circuit concluded that Mantor was not given a "meaningful opportunity" to opt out of the AIRP. App. 7a.

In October 2000, Mantor's employment was terminated by Circuit City. Approximately one year later, Mantor sued Circuit City in a California state court over a variety of employment related disputes, all of which fall squarely within the AIRP.

C. Proceedings Below

1. Circuit City petitioned the federal district court to compel arbitration. The district court granted the motion and

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[3] Circuit City refers to all applicants and current and former employees as "Associates."

stayed the state court action pending arbitration. App. 13a-14a.

2. Mantor appealed. The Ninth Circuit reversed the district court, holding that the entire arbitration agreement is unconscionable – and therefore unenforceable – under California law. App. 12a.

The court began by explaining that a contract is invalid under California law if it is both procedurally and substantively unconscionable. App. 5a. Procedural unconscionability occurs "[w]hen a party to a contract possesses far greater bargaining power than another party." App. 7a. Because of Circuit City's greater bargaining power, the court found the contract procedurally unconscionable. App. 7a-8a. Of course, this rule would apply in almost all employment situations.

Substantive unconscionability, the Ninth Circuit continued, occurs where the "terms of the agreement . . . are so one-sided as to shock the conscience." App. 8a. The court then held that a number of the provisions in the AIRP shocked the conscience. Specifically, the court found that it was substantively unconscionable to include in the AIRP a provision for a statute of limitations; an express prohibition on class actions; a cost-sharing provision; and a provision giving Circuit City unilateral power to modify or terminate the arbitration agreement. App. 8a-9a. By their express terms, of course, these provisions are specific to arbitration agreements.

The court went on to discuss two additional provisions and why they were, in the courts' view, substantively unconscionable. The court found the scope of the agreement to be substantively unconscionable. In *Ingle,* the court had held that an employment arbitration agreement is "one-sided" – and hence substantively unconscionable – if *in practice* an employee is likely to have claims to arbitrate against an employer but not vice versa. That rule applies *regardless* of

whether the express terms of the arbitration agreement bind both parties to arbitrate. Furthermore, *Ingle* established a (supposedly rebuttable) presumption that only an employee is likely to have claims to arbitrate against the employer, and not vice versa. App. 10a-11a (explaining *Ingle*); *Ingle*, 328 F.3d at 1173-75.

The Ninth Circuit held that the rules it established in *Ingle* "certainly would apply to the agreement we review in this case." App. 11a. Although "Circuit City . . . has not been given an opportunity to rebut the presumption" established in *Ingle*, the court found it unnecessary to remand the case to the district court: "Because so many other terms in this arbitration agreement are substantively unconscionable, we decline to enforce the agreement regardless of whether Circuit City would be able to rebut the presumption of substantive unconscionability regarding the scope of the agreement." App. 11a.

Finally, the court also found it unconscionable for the AIRP to require an employee to pay a $75 filing fee in order to initiate an arbitration proceeding. Although a litigant ordinarily pays a similar filing fee to a court in order to prosecute his or her claim, the Ninth Circuit found this fee unconscionable because it is paid to Circuit City, rather than to an arbitrator. App. 9a. The court also found the filing fee objectionable because the provision allowing for a waiver of the fee vests sole discretion to waive the fee with Circuit City. App. 9a-10a.

3. The Ninth Circuit declined to address in any meaningful manner the question of whether its use of the doctrine of unconscionability – in this case, applied in an arbitration-specific (and arbitration-hostile) manner – was preempted by § 2 of the FAA. Once again relying on *Ingle*, the court simply held that "federal law 'does not supplant state law governing the unconscionability of adhesive contracts.'" App. 5a (quoting *Ingle*, 328 F.3d at 1174 n. 10).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO ILLUSTRATE WHEN STATE-LAW RULES ARE PREEMPTED UNDER FAA § 2.

1. The present petition for a writ of certiorari is being filed concurrently with a petition in *Ingle*. Both petitions raise the same question and present this Court with the same conflict among the lower courts.

As Circuit City explains in its *Ingle* petition, the lower courts are split on the question of when state-law rules that would invalidate an arbitration agreement are preempted under FAA § 2. *See Ingle* Pet. at 13-16. Specifically, the Ninth Circuit (along with the Second Circuit and the California Supreme Court) holds that the mere fact that the state-law rule at issue is a generally applicable doctrine such as "unconscionability" automatically exempts the rule from preemption under § 2. In the Ninth Circuit's view, no further inquiry into how that generally applicable doctrine is applied in a particular case is necessary. According to these courts, a state-law rule is preempted under § 2 *only* if the rule applies to a limited class of contracts or a certain kind of contractual provision – even if the limitation is neither specific nor hostile to arbitration.

The First and Third Circuits, as well as the Alabama Supreme Court, hold to the contrary. According to these courts, a state-law rule invalidating an arbitration agreement is not immune from preemption merely because it can be described as a "generally applicable" rule such as unconscionability. In their view, the court must determine whether the generally applicable rule would be applied in an arbitration-specific manner – and if it would be, then the rule is preempted by the FAA.

2. *Ingle* is the best vehicle for addressing the question presented. In that case, the Ninth Circuit invalidated the

agreement based on a single and obviously arbitration-specific state-law rule – a rule that presumed all employment arbitration agreements to be "one-sided" and hence substantively unconscionable. This Court can reverse the Ninth Circuit's decision in *Ingle* on the simple and sharply-presented ground that the single rule applied by the Ninth Circuit is arbitration-specific and hence preempted.

3. This Court's decision in *Ingle* will have substantial bearing on the proper outcome of this case. If this Court holds – as we believe it should, *see Ingle* Pet. at 18-20 – that even the generally-applicable unconscionability doctrine may be preempted if it is applied in an arbitration-specific manner, then the outcome in *Mantor* would be different. *Mantor*, like *Ingle*, relies on a per se rule exempting all applications of unconscionability doctrine from preemption under § 2. Once that per se rule is rejected, the decision in *Mantor* cannot survive. At a minimum, then, this Court should hold *Mantor* pending the outcome of *Ingle*.

There are, however, compelling reasons to grant this petition together with the petition in *Ingle*. Unlike *Ingle*, in *Mantor*, the Ninth Circuit relied on the application of the unconscionability doctrine to several different features of the arbitration agreement in finding the agreement unenforceable. *Mantor* would allow this Court to apply the proper preemption standard to a number of different contractual provisions, and thus to provide additional and specific guidance to the lower courts.

That kind of additional guidance is necessary. The split among the lower courts persists even though this Court has been quite clear that a generally-applicable state-law rule is preempted when applied in an arbitration-specific manner. *See Ingle* Pet. at 18-20. Furthermore, the Ninth Circuit has so narrowly construed the preemptive effect of § 2, and so broadly construed the state-law doctrine of unconscionability, that virtually every provision of an employment arbitra-

tion agreement is held to be "unconscionable" and hence invalid. *See id.* at 22-24. Against this background, a significant risk exists that any standard established in *Ingle* might be confined to its facts – *i.e.*, a case dealing exclusively with "one-sidedness" – while some lower courts might turn to other standard features of arbitration agreements to support a holding of state-law unconscionability. This Court must establish the appropriate standard for preemption in a way that leaves no doubt as to how that standard applies. This Court can do that by granting the petition in *Mantor* along with the petition in *Ingle*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or, in the alternative, held pending the resolution of *Ingle*.

Respectfully submitted,

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October 20, 2003

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Petitioner-Appellee,

v.

Paul MANTOR,
an individual,
Respondent-Appellant.

No. 02-55230
D.C. No. CV-01-10115-MLR

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Submitted March 7, 2003[1]
Decided July 22, 2003

Before: Harry Pregerson, Sideny R. Thomas, Circuit Judges, and Louis F. Oberdorfer,[2] Senior District Judge.

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[1] The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

[2] The Honorable Louis F. Oberdorfer, Senior Judge, United States District Court for the District of Columbia, sitting by designation.

Opinion by Judge Pregerson

OPINION

PREGERSON, Circuit Judge:

Paul Mantor appeals from the district court's grant of Circuit City Stores, Inc.'s (Circuit City) motion to compel arbitration. Mantor argues on appeal that Circuit City's arbitration agreement is unenforceable under California law of unconscionability. We agree and therefore reverse and remand.

Facts and Procedural Background

Paul Mantor worked for Circuit City from August 1992 until October 2000, when Circuit City terminated his employment. When Circuit City hired Mantor, it had no arbitration program. In 1995, Circuit City implemented an arbitration program called the "Associate Issue Resolution Program" (AIRP).[3] Circuit City emphasized to managers the importance of full participation in the AIRP, claiming that the company had been losing money because of lawsuits filed by employees. Circuit City management stressed that employees had little choice in this matter; they suggested that employees ought to sign the agreement or prepare to be terminated. Although Circuit City circulated the forms regarding the AIRP in 1995, Mantor was able to avoid either signing up or openly refusing to participate[4] in the AIRP for three years. In 1998, Circuit City District Manager Brad Weiland and Circuit City's Personnel Manager for Northern California Karen Craig arranged a meeting with Mantor to discuss Mantor's participation in the AIRP. During this meeting, Mantor asked Weiland and Craig what would hap-

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[3] Circuit City refers to all job applicants and to current and former employees as "Associates."

[4] Circuit City circulated an "opt-out" form by which its employees could ostensibly elect not to participate in the AIRP.

pen should he decline to participate in the arbitration program. The Circuit City managers responded to the effect that he would have no future with Circuit City. On February 13, 1998, Mantor agreed to participate in the AIRP, acknowledging in writing his receipt of (1) an "Associate Issue Resolution Handbook," (2) the "Circuit City Dispute Resolution Rules and Procedures," and (3) a "Circuit City Arbitration Opt Out Form."

On October 10, 2001, a year after Circuit City terminated his employment, Mantor brought a civil action in state court, alleging twelve causes of action.[5] On October 17, 2001, to preserve his right to arbitrate his claims in the event that a court determined that his claims were subject to arbitration, Mantor submitted an Arbitration Request Form and a cashier's check in the amount of seventy-five dollars to Circuit City's Arbitration Coordinator.[6]

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[5] The causes of action included: (1) tortious termination in violation of public policy; (2) retaliation; (3) breach of contract; (4) breach of implied covenant of good faith and fair dealing; (5) violation of California Labor Code § 970; (6) fraud-intentional misrepresentation; (7) fraud-negligent misrepresentation; (8) intentional infliction of emotional distress; (9) negligent infliction of emotional distress; (10) defamation; (11) failure to pay earned wages and reimburse expenses; and (12) age discrimination.

[6] The AIRP requires employees to file the Arbitration Request Form--along with seventy-five dollars--with Circuit City to initiate a complaint. Circuit City twice rejected Mantor's arbitration request. The first time Circuit City rejected the request "for lack of completeness" because Mantor's attorneys--not Mantor himself--signed the request. The second time Circuit City rejected the request because Mantor's attorneys redacted certain language on the form to avoid waiving Mantor's right to litigate the dispute. Although we fail to see why Mantor's attorneys' signatures did not suffice the first time, *see* Fed.R.Civ.P. 11(a); Cal. Civ. P. § 283 (2000), we conclude that Circuit City implicitly acknowledged the validity of the arbitration request when it sent a letter--dated November 26, 2001--to the National Arbitration and Mediation firm for the purpose of selecting an arbitrator for the Mantor dispute.

On November 26, 2001, Circuit City petitioned the district court to compel arbitration under 9 U.S.C. § 4 (2000). On December 27, 2001, following briefing and oral arguments, the district court granted Circuit City's motion to compel arbitration and stayed the state court action pending arbitration. On January 25, 2002, Mantor filed a timely notice of appeal with this court. On appeal, Mantor argues that the district court erred in granting the order to compel arbitration because the arbitration agreement is unconscionable under California contract law. Mantor also contends that this court's decision in *Duffield v. Robertson Stephens Co.*, 144 F.3d 1182 (9th Cir.1998), which precludes compulsory arbitration of claims under Title VII and California's Fair Employment and Housing Act (FEHA), compels the conclusion that the arbitration agreement is unenforceable.[7]

Discussion

We have jurisdiction to review an order compelling arbitration under 9 U.S.C. § 16(a)(3) (2000). *Green Tree Fin. Corp.-Alabama v. Randolph,* 531 U.S. 79, 84-89, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000); *Prudential Ins. Co. of Am. v. Lai,* 42 F.3d 1299, 1302 (9th Cir.1994), *cert. denied,* 516 U.S. 812, 116 S.Ct. 61, 133 L.Ed.2d 24 (1995). We review de novo the district court's order compelling arbitration. *Circuit City Stores, Inc. v. Adams,* 279 F.3d 889, 892 n. 2 (9th Cir.2002) (*Adams III*).

I.

Mantor contends that Circuit City's arbitration agreement[8] is unconscionable under California contract law. Fed-

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[7] We decide this case solely under California law of unconscionability. Thus, we need not reach Mantor's argument that *Duffield* precludes enforcement of Circuit City's arbitration agreement. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1169 n. 2 (9th Cir.2003).

[8] The arbitration agreement Mantor signed provided that the rules governing an arbitration proceeding would be those in effect at the time

eral law provides that arbitration agreements generally "shall be valid, irrevocable, and enforceable" except when grounds "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2002); *Ingle,* 328 F.3d at 1170. But federal law "does not supplant state law governing the unconscionability of adhesive contracts." *Ingle,* 328 F.3d at 1174 n. 10. In California, courts may refuse to enforce an arbitration agreement if it is unconscionable.[9] Cal. Civ.Code § 1670.5 (1999). Unconscionability exists when one party lacks meaningful choice in entering a contract or negotiating its terms and the terms are unreasonably favorable to the other party. *Ingle,* 328 F.3d at 1170; *A & M Produce Co. v. FMC Corp.,* 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114 (1982). Accordingly, a contract to arbitrate is unenforceable under the doctrine of unconscionability when there is "both a procedural and substantive element of unconscionability." *Ferguson v. Countrywide Credit Indus., Inc.,* 298 F.3d 778, 783 (9th Cir.2002); *accord Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000). But procedural and substantive unconscionability "need not be present in the same degree." *Armendariz,* 99 Cal.Rptr.2d 745, 6 P.3d at 690. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.*

Mantor submitted his Arbitration Request Form and filing fee. The 2001 Dispute Resolution Rules and Procedures were in effect on October 17, 2001, the date he first submitted the Arbitration Request Form and filing fee. We therefore review these rules for the purposes of this appeal.

[9] Because Mantor was employed in California, we evaluate the arbitration agreement under the contract law of that state. *Ingle,* 328 F.3d at 1170; *Adams III,* 279 F.3d at 892; *see also Ticknor v. Choice Hotels Int'l, Inc.,* 265 F.3d 931, 937 (9th Cir.2001) (applying Montana law in deciding whether arbitration clause was valid).

A.

To determine whether Circuit City's arbitration agreement with Mantor is procedurally unconscionable we must evaluate how the parties negotiated the contract and "the circumstances of the parties at that time." *Ingle,* 328 F.3d at 1171 (quoting *Kinney v. United Healthcare Servs., Inc.,* 70 Cal.App.4th 1322, 1329, 83 Cal.Rptr.2d 348, 352-53 (1999)). One factor courts consider to determine whether a contract is procedurally unconscionable is whether the contract is oppressive. *Id.* Courts have defined oppression as springing "from an inequality of bargaining power[that] results in no real negotiation and an absence of meaningful choice." *Stirlen v. Supercuts, Inc.,* 51 Cal.App.4th 1519, 1532, 60 Cal.Rptr.2d 138, 145 (1997) (internal quotation marks and citations omitted). Another factor courts look to is surprise, defined as "the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Id.*

Circuit City argues that because Mantor was given an opportunity to "opt-out" of the arbitration agreement, the agreement was not oppressive -- and therefore not procedurally unconscionable. In support of its argument, Circuit City cites our decisions in *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104 (9th Cir.2002), and *Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198 (9th Cir.2002). We do not agree that *Najd* and *Ahmed* guide our analysis here; in both *Najd* and *Ahmed,* the arbitration agreement did not prove procedurally unconscionable specifically because both Najd and Ahmed had a *meaningful* opportunity to opt-out of the arbitration program. *See Najd,* 294 F.3d at 1108; *Ahmed,* 283 F.3d at 1200. Mantor had no such *meaningful* opportunity.

In 1995, Mantor was given an "opt-out" form by which he could elect not to participate in the arbitration program. But Circuit City management impliedly and expressly pres-

sured Mantor not to opt-out, and even resorted to threatening his job outright should Mantor exercise his putative "right" to opt-out.[10] The fact that Circuit City management pressured and even threatened Mantor into assenting to the arbitration agreement demonstrates that he had no *meaningful* opportunity to opt-out of the program. When a party to a contract possesses far greater bargaining power than another party, or when the stronger party pressures, harasses, or compels another party into entering into a contract, "'oppression and, therefore, procedural unconscionability, are present.'" *See Ingle,* 328 F.3d at 1172 (quoting *Ferguson,* 298 F.3d at 784). A meaningful opportunity to negotiate or reject the terms of a contract must mean something more than an empty choice. At a minimum, a party must have reasonable notice of his opportunity to negotiate or reject the terms of a contract, *and* he must have an actual, meaningful, and reasonable choice to exercise that discretion. In light of Circuit City's insistence that Mantor sign the arbitration agreement--under pain of forfeiting his future with the company--the fact that in 1995 Mantor was presented with an opt-out form does not save the agreement from being oppressive, for Mantor had no meaningful choice, nor any legitimate opportunity, to negotiate or reject the terms of the arbitration agreement. Thus, this court's decisions in *Ingle* and *Adams III,* rather than our decisions in *Najd* and *Ahmed,* govern this appeal. Accordingly, because Circuit City presented the arbitration agreement to Mantor on an "adhere-or- reject" basis we conclude that the arbitration agreement was procedurally uncon-

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[10] Circuit City does not offer evidence to controvert Mantor's allegation that he was pressured and threatened into assenting to the arbitration agreement.

scionable.[11] *See Ingle,* 328 F.3d at 1172; *Adams III,* 279 F.3d at 893.

B.

We turn now to consider whether the arbitration agreement is substantively unconscionable. Substantive unconscionability concerns the "'terms of the agreement and whether those terms are so one-sided as to shock the conscience.'" *Ingle,* 328 F.3d at 1172 (quoting *Kinney,* 70 Cal.App.4th at 1330, 83 Cal.Rptr.2d at 353 (citations omitted)).

To evaluate the substantive terms of a contract, a court must analyze the contract "as of the time [it] was made." *A & M Produce Co.,* 135 Cal.App.3d at 487, 186 Cal.Rptr. 114 (citation omitted).

Many of the terms we have already held to be substantively unconscionable in earlier versions of Circuit City's arbitration agreement remain in the 2001 version we review in this case. In *Ingle,* we reviewed the 1998 version of Circuit City's arbitration agreement, holding that the scope of the agreement itself as well as the terms concerning the statute of limitations, the prohibition on class actions, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to modify or terminate the arbitration agreement were substantively unconscionable. *Ingle,* 328 F.3d at 1172-79.

We note that Circuit City has modified and improved its arbitration agreement to comport with our holding regarding limitations on available remedies.[12] But the substantively

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[11] Because we base our conclusion that the agreement is procedurally unconscionable on the agreement's oppressiveness, we need not pass judgment on whether surprise exists in this arbitration agreement.

[12] In *Ingle* and *Adams III,* we held that the restrictions on remedies available to plaintiffs under Circuit City's arbitration agreement were substantively unconscionable. *Ingle,* 328 F.3d at 1178-79; *Adams III,* 279 F.3d at 894. The arbitration agreement we review in this case directs

unconscionable provisions concerning the statute of limitations,[13] class actions,[14] cost-splitting,[15] and Circuit City's unilateral power to modify or terminate the arbitration agreement[16] remain in the version of the agreement we review in this case. For the reasons expressed in prior decisions,[17] we again hold that these terms are substantively unconscionable.

1. **Filing Fee/Waiver Provision**

Under its arbitration program, Circuit City requires an employee to pay a seventy-five dollar filing fee to initiate an arbitration proceeding. In *Ingle,* we criticized the filing fee rule in the 1998 version of the arbitration agreement because "the employee is required to pay Circuit City for the privilege of bringing a complaint." This, we held, was "not the '*type* of expense that the employee would be required to bear' in federal court." *Id.* at 1177 (quoting *Armendariz,* 99 Cal.Rptr.2d 745, 6 P.3d at 687). Thus, we concluded that it was improperly one-sided.

We also observed that "Circuit City's [1998] arbitration agreement . . . makes no . . . provision for waiver of the filing fee (or other fees and costs of arbitration)." *Id.* at 1177, 99 Cal.Rptr.2d 745, 6 P.3d 669. In federal court, indigent plaintiffs may be exempt from having to pay court fees. *Id.*; 28 U.S.C. § 1915(a)(1) (2000). In the 2001 version of the arbitration agreement we review here, Circuit City has revised the rule to allow for waiver of the filing fee. But the

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the arbitrator to "award appropriate relief in accordance with applicable law," which brings this provision in line with our previous holdings.

[13] *See Ingle,* 328 F.3d at 1175.

[14] *See id.* at 1175-76.

[15] *See id.* at 1177-78.

[16] *See id.* at 1179.

[17] *See id.* at 1172-79; *Adams III,* 279 F.3d at 893-96.

fact that Circuit City vests in itself the sole discretion to consider applications for waivers indicates that the process of filing could be halted unilaterally by Circuit City if an employee does not have the means to pay the seventy-five dollar filing fee. The fee waiver provision might not be one-sided if the discretion to waive the fee were assigned to a disinterested party.[18] However, because the fee waiver rule (1) provides that an employee must pay an interested party "for the privilege of bringing a complaint"[19] and (2) assigns Circuit City, an interested party, the responsibility for the decision whether to waive the filing fee, this rule is manifestly one-sided, and therefore, substantively unconscionable.

2. **Scope of Circuit City's Arbitration Agreement**

We recognize that Circuit City has amended its arbitration agreement to indicate that legal claims brought by Circuit City and employees both are subject to arbitration. The agreement we reviewed in *Ingle* expressly applied to "all claims of an Associate." Circuit City has since excised the words limiting the scope of the agreement to employee claims. But we also noted in *Ingle* that "[e]ven if the limitation to claims brought by employees were not explicit, an arbitration agreement between an employer and an employee ostensibly binds to arbitration only employee-initiated actions." *Id.* at 1175. We reasoned that "[b]ecause the possibility that Circuit City would initiate an action against one of its employees is so remote, the lucre of the arbitration agreement flows one way: the employee relinquishes rights while the employer generally reaps the benefits of arbitrating its

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[18] *Cf. Cheng-Canindin v. Renaissance Hotel Assoc.*, 50 Cal.App.4th 676, 687-88, 57 Cal.Rptr.2d 867 (1996) (holding that "a dispute resolution procedure is not an arbitration unless there is a third party decision maker . . . and a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision").

[19] *Ingle*, 328 F.3d at 1177.

employment disputes." *Id.* at 1174 (footnote omitted). Thus, we concluded that:

> under California law, a contract to arbitrate between an employer and an employee . . . raises a rebuttable presumption of substantive unconscionability. Unless the employer can demonstrate that the effect of a contract to arbitrate is bilateral--as is required under California law--with respect to a particular employee, courts should presume such contracts substantively unconscionable.

Id. (footnote and citations omitted). This holding certainly would apply to the agreement we review in this case; however, this case had already been submitted by the time *Ingle* was decided. Circuit City, therefore, has not been given an opportunity to rebut the presumption that the arbitration agreement between Mantor and Circuit City is substantively unconscionable. While perhaps under other circumstances we would find it necessary to remand to the district court to allow Circuit City to present evidence tending to rebut the presumption that its arbitration agreement is substantively unconscionable, we need not remand in this case. Because so many other terms in this arbitration agreement are substantively unconscionable, we decline to enforce the agreement regardless of whether Circuit City would be able to rebut the presumption of substantive unconscionability regarding the scope of the agreement.

C.

Under California law, a court has discretion whether to sever particular unconscionable terms or invalidate a contract entirely. Cal. Civ.Code § 1670.5(a) (1999). To assess whether unconscionable terms can be severed, a court considers whether the illegality is "central" or "collateral" to the purpose of the contract to determine whether an entire contract should be invalidated or whether only a particular term or set of terms should be severed. *Armendariz,* 99

Cal.Rptr.2d 745, 6 P.3d at 696-97. We are mindful of the federal policy in favor of arbitration agreements. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). But "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" federal law. *Doctor's Assocs. v. Casarotto,* 517 U.S. 681, 686-87, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). As we discussed above, under California contract law, a party may not fashion an adhesive arbitration agreement that significantly limits the other party's ability to substantiate his legal claims. The arbitration agreement between Circuit City and Mantor violates that rule: the arbitration agreement was procedurally unconscionable and numerous provisions in Circuit City's arbitration agreement operate to benefit itself at its employees' expense. Because "[a]ny earnest attempt to ameliorate the unconscionable aspects of Circuit City's arbitration agreement would require this court to assume the role of contract author rather than interpreter," we hold that this agreement is unenforceable in its entirety. *Ingle,* 328 F.3d at 1180; *Adams III,* 279 F.3d at 895-96.

Conclusion

Because we conclude that the Circuit City arbitration agreement is unconscionable under California contract law, we reverse the district court's order compelling arbitration and remand with instructions to allow the civil action to continue in state court.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIRCUIT CITY STORES, INC., a
Virginia corporation,
Petitioner.

v.

PAUL MANTOR, an individual,
Respondent.

CASE NO. CV 01-10115 R (JWJ)

ORDER STAYING STATE COURT ACTION AND COMPELLING ARBITRATION

THIS MATTER came regularly before the Court for hearing on December 17, 2001, in Courtroom 8. Present for Petitioner Circuit City Stores, Inc., was Paul Plevin & Sullivan, by E. Joseph Connaughton. Present for Reponsent Paul Mantor was Gordon & Rees, by James McMullen.

Having considered Petitioner Circuit City Stores, Inc.'s Petition to Compel Arbitration and to Stay Lawsuit Pending Arbitration, and the exhibits thereto, the Declaration of Teri C. Miles in Support of Petition to Compel Arbitration and to Stay Lawsuit Pending Arbitration, and the exhibits thereto, and Respondent Paul Mantor's Opposition and Amended Opposition, as well as the Declaration of Paul Mantor, the Declaration of James McMullen, the Declaration of Jennifer Sarkozy Branch, and Respondent's Index of Evidence and attached exhibits; and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The California Superior Court lawsuit currently pending in Los Angeles County as case no. BC 259540 is hereby stayed in its entirety pending completion of the arbitration of this dispute;
2. All claims encompassed in the Los Angeles County Superior Court lawsuit, case no. BC 259540, are hereby compelled into arbitration; and
3. The action is dismissed.

Dated: Dec. 27, 2001

/s/ HONORABLE MANUEL L. REAL
UNITED STATES DISTRICT COURT JUDGE

No. 03-605

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

PAUL MANTOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held that an arbitration agreement or employment contract is unconscionable when i) the employee could not negotiate any of the terms of the agreement and he was told his career with the company would be over if he did not accept it; and ii) the employer controlled the administration of the arbitration plan and made the decision unilaterally whether the employee's claim would be accepted?

TABLE OF CONTENTS

		Page
I.	QUESTION PRESENTED	1
II.	INTRODUCTION	1
III.	STATUTES INVOLVED	2
IV.	FACTS AND PROCEDURAL BACKGROUND	3
V.	REASONS THIS PETITION SHOULD NOT BE GRANTED	5
VI.	CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Circuit City Stores, Inc. v. Adams, 279 F.3d 889, *cert. den.*, 532 U.S. 938 (2002) 6

Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198 (9th Cir. 2002) 7

Circuit City Stores, Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002) 7

Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) 1, 6

Richards v. CH2M Hill, Inc., 29 P.3d 175 (2001) 6

Szeteln v. Discover Bank, 118 Cal.Rptr. 862, *rehg. den., review denied* (2002) 6

STATUTES AND RULES

9 U.S.C. § 2 2

9 U.S.C. § 4 5

California Civil Code

§ 1670.5(a) 2, 7

California Labor Code

§ 970 4

INTRODUCTION

Petitioner Circuit City Stores, Inc. ("Petitioner" or "Circuit City") brings this case, initiated by its manager Paul Mantor ("Respondent" or "Mr. Mantor") as a lawsuit in California Superior Court, as an adjunct to its petition to review *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165. (*See* Petition for Writ of Certiorari, *Circuit City Stores, Inc. v. Ingle*, No. 03-604.) Respondent's counsel agrees that most dispositive issues are addressed in his Brief in Opposition to that petition.

Petitioner asks this Court as it does in *Ingle* to carve out a special exemption from state contract law for employers who impose compulsory pre-dispute arbitration programs on its employees and applicants for employment. Petitioner finds authority for its proposition in the Federal Arbitration Act ("FAA") Section 2.

The appellate court reviewed the entire record and found that Circuit City had imposed its arbitration program on Mr. Mantor without giving him a meaningful opportunity to negotiate its terms or to reject it if he chose to do so. Circuit City's District Manager forthrightly told Mr. Mantor that if he didn't sign up for the arbitration program he would have "no future with Circuit City." The appellate court concluded that a choice considered under threat of termination was no meaningful choice at all.

There is no question presented in this petition other than the one presented in *Ingle*. The *Mantor* petition, standing alone, presents no serious reason to grant certiorari. Even if the *Ingle* petition were granted, nothing is gained by granting this petition or by holding the case pending a result in *Ingle*. For the reasons explained more

fully in the Brief in Opposition filed in *Ingle*, that petition should be denied as well.

California and the Ninth Circuit treat mandatory employment arbitration agreements the same as other contracts. This is what the FAA requires. Under generally-applicable contract law, the agreement Circuit City imposed on Mr. Mantor by threat of termination was unconscionable and thus it was unenforceable. The Ninth Circuit ruled correctly. This Court should deny the petition for writ of certiorari.

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. Section 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

California Civil Code ("CC") § 1670.5(a) reads:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it

may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

FACTS AND PROCEDURAL BACKGROUND

Mantor worked for Circuit City from August 1992 until October 2000, when Circuit City terminated his employment as a manager. Mantor alleges and the circumstances indicate that he was terminated in response for his truthful testimony in support of a lower-level employee in a sexual assault case brought against her Circuit City manager.

When Circuit City hired Mantor, it had no arbitration program. In 1995, Circuit City implemented an arbitration program called the "Associate Issue Resolution Program" (AIRP).[1] Circuit City emphasized to managers the importance of full participation in the AIRP, claiming that the company had been losing money because of lawsuits filed by employees. Circuit City management stressed that employees had little choice in this matter; it suggested that employees ought to sign the agreement or prepare to be terminated. Although Circuit City circulated the forms regarding the AIRP in 1995, Mantor was able to avoid

[1] Circuit City refers to all job applicants and to current and former employees as "Associates."

either signing up or openly refusing to participate[2] in the AIRP for three years.

In 1998, Circuit City District Manager Brad Weiland and Circuit City's Personnel Manager for Northern California Karen Craig arranged a meeting with Mantor to discuss Mantor's participation in the AIRP. During this meeting, Mantor asked Weiland and Craig what would happen should he decline to participate in the arbitration program. The Circuit City managers responded to the effect that he would have no future with Circuit City. On February 13, 1998, Mantor agreed to participate in the AIRP, acknowledging in writing his receipt of (1) an "Associate Issue Resolution Handbook," (2) the "Circuit City Dispute Resolution Rules and Procedures," and (3) a "Circuit City Arbitration Opt Out Form."[3]

On October 10, 2001, a year after Circuit City terminated his employment, Mantor brought a civil action in state court, alleging twelve causes of action. The causes of action included: (1) tortious termination in violation of public policy; (2) retaliation; (3) breach of contract; (4) breach of implied covenant of good faith and fair dealing; (5) violation of California Labor Code § 970; (6) fraud-intentional misrepresentation; (7) fraud-negligent misrepresentation; (8) intentional infliction of emotional distress;

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[2] Circuit City circulated an "opt-out" form by which its employees could ostensibly elect not to participate in the AIRP.

[3] The record is uncontroverted on this point. Petitioner had the opportunity to offer contrary evidence concerning the agreement to arbitrate at the hearing of the motion to compel arbitration if any such evidence existed. It did not do so.

(9) negligent infliction of emotional distress; (10) defamation; (11) failure to pay earned wages and reimburse expenses; and (12) age discrimination.

On October 17, 2001, to preserve his right to arbitrate his claims in the event that a court determined that his claims were subject to arbitration, Mantor submitted an Arbitration Request Form and a cashier's check in the amount of seventy-five dollars to Circuit City's Arbitration Coordinator.

On November 26, 2001, Circuit City petitioned the district court to compel arbitration under 9 U.S.C. §4. On December 27, 2001, following briefing and oral arguments, the district court granted Circuit City's motion to compel arbitration and stayed the state court action pending arbitration. On January 25, 2002, Mantor filed a timely notice of appeal with the Ninth Circuit Court of Appeals.[4]

REASONS THIS PETITION SHOULD NOT BE GRANTED

Petitioner misrepresents the Ninth Circuit's opinion as it respects substantive unconscionability. First, the statute of limitations provision was criticized (in *Ingle*, the opinion cited for this proposition) because the statute of limitations contained in the "rules" promulgated by Circuit City shortened the time for filing certain claims so that the time for filing a number of potential claims – including

[4] This statement of facts is taken directly from the appellate opinion, with one substantive addition and some editorial changes and deletions.

most of Mr. Mantor's claims – was truncated substantially. Moreover, the time limitation precluded operation of the "continuing violation" theory of employment discrimination that had recently been clarified by the State Supreme Court in *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 29 P.3d 175 (2001). (*See Ingle, supra*, 328 F.3d at 1175, citing *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894, *cert. den.*, 532 U.S. 938 (2002).)

Additionally, Petitioner derides the opinion insofar as it finds the $75.00 filing fee to be oppressive. However, as the opinion states expressly: "In *Ingle*, we criticized the filing fee rule in the 1998 version because 'the employee is required to pay Circuit City for the privilege of bringing the complaint. [*Ingle*, 328 F.3d at 1177]." (*Mantor*, Pet.App. 9a.)[5] This provision gave Circuit City the unfettered discretion to decide when and whether the fee would be waived or a cognizable claim had been filed against it that it would deem worthy to submit to the arbitrator. This is no idle or hypothetical power: Circuit City determined here that Mr. Mantor had not complied with the claim filing rule, and rejected it. (*Mantor,* Pet.App. 3a, n.6.)

Finally, Petitioner inaccurately criticizes the appellate panel for relying on the case refusing to enforce a provision precluding arbitration of class actions, *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 118 Cal.Rptr. 862, *rehg. den., review den.* (2002). The California Supreme Court decided to review the case, hence it was governing

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[5] *Mantor* considered the 2001 version of Circuit City's DRA; *Ingle* examined the 1998 version. (*See Mantor*, Pet.App. 4a, n.8; also Pet.App. 8a.)

law on the issue. The Ninth Circuit was wholly justified in recognizing that this would remain the law, even as a contrary opinion had been granted review.

With respect to procedural unconscionability, Petitioner's rendition of the facts and its characterization of the court's holding omits key findings. The court found expressly: "The fact that Circuit City management pressured and even threatened Mantor into assenting to the agreement demonstrates that he had no *meaningful* opportunity to opt-out of the program." (*Mantor*, Pet.App. 8a, emphasis added.)

This aspect of the *Mantor* opinion spotlights Petitioner's error in both the *Ingle* and *Mantor* briefs. Employer/employee agreements are not "automatically" found to be procedurally unconscionable in the Ninth Circuit. Circuit City's AIRP was found procedurally unconscionable in *Ingle* and *Mantor*, but not in the cases cited in *Mantor*, Pet.App. 6a, *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002) and *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002). The differing results are not a product of failed intra-circuit communication or legal inconsistency. The results are different because Circuit City employees Najd and Ahmed had meaningful opportunities to negotiate – to accept the AIRP or opt-out of it. They each chose not to opt-out. The Ninth Circuit compelled each of them to arbitrate, even though the agreement and its rules were substantively unconscionable. Ms. Ingle and Mr. Mantor did not. These results comport fully with CC §1670.5 and California cases construing that statute.

CONCLUSION

For the foregoing reasons and for the reasons stated in the *Ingle* Brief in Opposition, Respondent respectfully requests that Circuit City's petition be denied.

Respectfully submitted,

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No. 03-604 AND No. 03-605

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
CATHERINE INGLE,
Respondent.

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
PAUL MANTOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI 1

I. A CONFLICT EXISTS AMONG THE LOWER COURTS ON THE SCOPE OF FAA PREEMPTION..... 2

II. THE DECISION BELOW TURNS ON A PRESUMPTION AGAINST ENFORCEMENT OF EMPLOYMENT ARBITRATION AGREEMENTS THAT IS ARBITRATION-SPECIFIC ON ITS FACE..... 2

CONCLUSION..... 4

TABLE OF AUTHORITIES

Page(s)

CASES

Armendariz v. Found. Health Psychare Servs.,
6 P.3d 669 (Cal. 2000) 2

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 3

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991).....1

BRIEF IN REPLY TO OPPOSITIONS TO PETITIONS FOR WRITS OF CERTIORARI

Respondents' opposition briefs[1] only confirm that certiorari should be granted in these cases. The question presented is not, as respondents suggest, Ingle BIO ("BIO") at 11, one of California law. Rather, it is a critical question of *federal* law: whether the Federal Arbitration Act ("FAA") preempts the arbitration-specific application of state unconscionability doctrine to invalidate arbitration agreements. The lower courts are divided on that question, and nothing in respondents' briefs shows otherwise. Nor can respondents rebut the fact that the decision below turns critically on a presumption against enforcement of mandatory employment arbitration agreements.

Instead, respondents argue that selective application of state-law rules to void employment arbitration agreements is justified by the inequality of bargaining power inherent in the employment relationship. BIO at 11-13, 15-17. This Court, of course, has rejected just such arguments. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); Ingle Pet. ("Pet.") at 20-24. In any event, respondents' merits argument is not a reason to deny certiorari. If there is any genuine question as to whether state-law rules may be applied selectively to invalidate employment arbitration agreements, then the Court should grant certiorari to reaffirm *Gilmer* and clarify that the FAA preempts arbitration-specific application of a state's unconscionability doctrine.

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[1] The petitions in *Circuit City Stores, Inc. v. Ingle* (No. 03-604) and *Circuit City Stores, Inc. v. Mantor* (No. 03-605) have been consolidated. For convenience, petitioner has filed one reply brief in response to both briefs in opposition to certiorari, and refers to respondents Ingle and Mantor jointly as "respondents."

I. A CONFLICT EXISTS AMONG THE LOWER COURTS ON THE SCOPE OF FAA PREEMPTION.

Though respondents attempt to rebut petitioner's showing of a stark conflict among the lower courts on the question presented, they are entirely unsuccessful. This is not a case, as respondents would have it, in which different state laws lead to different results. BIO at 11. Rather, the courts are divided on the federal-law question of when the FAA preempts the application of state rules to invalidate arbitration agreements.

The Ninth Circuit below, like the Second Circuit and the California Supreme Court, asks only whether the state-law rule may be classified on its face as a rule of general application, such as "unconscionability." *See* Pet. at 13-14. But any fair reading of the decisions of the First and Third Circuits and the Alabama Supreme Court shows that this is just the *beginning* of the FAA preemption inquiry in those jurisdictions. A court must then ask a second question: Is the state-law rule of general applicability being used in a manner that singles out, or is specific to, the arbitration context? If so, that selective application is preempted by the FAA. *See* Pet. at 14-16. Even the lower courts themselves have begun to recognize the conflict among them. *See Armendariz v. Found. Health Psychare Servs.*, 6 P.3d 669, 692 (Cal. 2000) (noting conflict with Alabama Supreme Court). Respondents' arguments about state law are irrelevant, and do nothing to harmonize the conflicting cases.

II. THE DECISION BELOW TURNS ON A PRESUMPTION AGAINST ENFORCEMENT OF EMPLOYMENT ARBITRATION AGREEMENTS THAT IS ARBITRATION-SPECIFIC ON ITS FACE.

Respondents do not dispute that the decision below invalidates petitioner's arbitration agreement because, in the view of the Ninth Circuit, it is insufficiently "bilateral." *See*

Pet. at 9-10 (describing holding below). As petitioner has shown already, that holding rests on an entirely new presumption that all mandatory arbitration contracts in the employment context – regardless of their express terms – are impermissibly one-sided and hence unenforceable. Even an agreement that *by its own terms* binds both employers and employees is presumptively unenforceable. According to the Ninth Circuit, one must presume that such an agreement will not operate bilaterally in practice because employees have less bargaining power and more claims to arbitrate than their employers. Pet. at 8-9, 17-18; Pet. App. 13a. In short, the decision below turns critically on a presumption against enforcement of employment arbitration agreements that by its very terms is arbitration-specific.

Respondents do not (and cannot) dispute this plain reading of the opinion below.[2] Instead, they attempt to justify the Ninth Circuit's arbitration-specific presumption of invalidity on the merits, by resuscitating the "inequality of bargaining power" argument first rejected by this Court more than a decade ago in *Gilmer* and again rejected in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). In both *Gilmer* and *Adams*, this Court held squarely that concerns about inequality of bargaining power and fairness to employees cannot justify a refusal to enforce mandatory employment arbitration agreements, and that rulings to the contrary are inconsistent with the pro-arbitration federal policy reflected in the FAA. *See* Pet. at 20-21. Respondents' merits arguments, like the decision below, cannot be reconciled with this Court's precedent. If there were any doubt on that score – which there is not – that would not be a reason for denying certiorari. On the contrary, such "doubt" would only con-

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[2] Respondents do argue that the Ninth Circuit's new presumption of invalidity applies only to "mandatory" employment arbitration agreements. BIO at 16. Both the petitions here deal with just such "mandatory" agreements, so that the Ninth Circuit's presumption indisputably applies and respondents' arguments are beside the point.

firm the need for prompt review by this Court so as to put to rest any lingering questions about the scope and vitality of its holdings in *Gilmer* and *Adams*.

CONCLUSION

This Court should resolve the conflict among the federal circuits and state supreme courts on the important issue of the enforcement of employment arbitration agreements pursuant to the FAA. Respondents have offered no compelling argument against this Court's consideration and resolution of that dispute. By granting certiorari, this Court can ensure that lower courts will not use state-law unconscionability doctrine to contravene this Court's precedents and the pro-arbitration public policy articulated in the FAA.

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